In the United States District Court for the Northern District of Illinois, Eastern Division

CIVIL ACTION No. 49 C 227

A. J. FELMAN, PLAINTIFF

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

MOTION TO AFFIRM

Pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Federal Communications Commission move that the judgment of the district court from which the appeal has been taken be affirmed.

This is an appeal from the final judgment entered on March 13, 1950, by a three-judge district court constituted pursuant to the provisions of Section 402 (a) of the Communications Act of 1934, as amended, 47 U. S. C. 402 (a), granting appellees' motion for summary judgment in an action brought by appellant to enjoin the enforcement of Section 3.109 of the Rules and Regulations of the Federal Communications Commission

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(14 F. R. 179). The appeal was taken pursuant to Section 1253 of Title 28, United States Code.

Appellant is the former owner of the standard broadcast radio station WCLS (now WJOL). In 1932 he sold all the stock of the corporate licensee of the station to one R. W. Hoffman.[1] As part of the consideration for sale of the station, appellant retained the right to free use of certain broadcast time. On August 9, 1937, the parties replaced this contract by a new contract, which is presently in force. It provides that the station, as long as it is operated, will furnish appellant, without cost, ¾ of an hour per day of broadcast time for the purpose of advertising his own business or any other firm with which he does business. An application for a renewal of station WJOL's license is presently pending. The station has been granted successive extensions of time, largely because of pendency of proceedings relating to the contract granting reserved time to appellant, and the station is currently operating under a temporary license expiring June 1, 1950.

Section 3.109 of the Rules and Regulations of the Federal Communications Commission, which appellant is attacking in this action, was promulgated by the Commission's Report and Order of

[1] The call letters of the station were subsequently changed to WJOL and it will hereafter be referred to as WJOL. In 1932 the corporate licensee was WCLS, Inc., which later changed its name to Joliet Broadcasting Company.

January 7, 1949, effective February 15, 1949. The Order issued following a Notice of Proposed Rule Making on February 5, 1948, and a Supplemental Notice on April 14, 1948. The notices gave interested parties opportunity to submit comments on the proposed rules and to present oral argument before the Commission. Appellant and other interested parties did submit comments and present oral argument to the Commission.[2]

Section 3.109, which is set forth in Appendix A hereto, concerns contracts made by vendors of radio stations reserving broadcast time, station control, or a reversionary interest therein. Subsection (a) sets forth the general rule that no licenses shall be issued to stations which, as consideration for their transfer or assignment, enter into contracts reserving in the transferor a right of reversion or reassignment of the license, or reserving a right to use the facilities of the station for any period.

Subsection (b) is a proviso applicable to appellant, and covers the situation where such a contract was in existence at the time the regulation issued, and had been disclosed to and approved by the Commission in passing on the transfer of the license. In such cases, the Com-

[2] After the present action was instituted, the Commission issued on August 10, 1949, a memorandum opinion and order denying petitions for rehearing filed by two parties who had participated in the rule-making proceeding. 1 Pike & Fischer R. R. 91 : 124.

mission will consider issuance of a license if the contract is modified. It is provided that such modifications "will be considered on the facts of each case but no such modification will be approved unless the modified contract contains at least" the provisions set forth in six subsections. The three which appellant attacks in this suit provide, in substance, as follows:

3 8. A ~~provision giving the licensee the~~ prohibition against resale or re- assignment of any of the reserve broadcast time.

5. An express expiration date for the contract, which date shall not extend beyond February 15, 1964, or the expiration date provided by the contract, whichever is earlier.

6. A provision giving the licensee the right to terminate the contract for substantial cause, including transfer of control of the license, consistent disagreement on programs, or the acquisition of a network affiliation, upon payment by the licensee of an amount to be agreed upon, but which should not be so unduly large as to constitute an effective deterrent to the licensee exercising the right of termination, and which amount would be decreased as the time reserved by the contract decreases as a result of performance.

Appellant attacks these regulations upon the ground that they exceed the rule-making power of the Commission and constitute a deprivation of property contrary to the Fifth Amendment.

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The district court, in granting summary judgment for appellees, filed findings of fact and conclusions of law, but did not render an opinion. The court's conclusions state that the regulations which are in issue on this appeal are within the rule-making authority of the Commission under the Federal Communications Act, are a reasonable exercise of that authority, and do not deprive appellant of property without due process of law.

We submit that the district court's decision clearly is correct. It is settled that the statute authorizes the Commission to make rules and regulations directed against restraints imposed by third persons upon a licensee's operation of a broadcasting station, when such restraints may interfere with the licensee's ability to render the best practicable service to his listening public. *National Broadcasting Company* v. *United States,* 319 U. S. 190. Section 4 (i) of the Act, 47 U. S. C. 154 (i), provides that "the Commission may make such rules and regulations, not inconsistent with this Act, "as may be necessary in the execution of its functions," and Section 303 (r), 47 U. S. C. 303 (r), authorizes the Commission to make such rules and regulations, not inconsistent with law, "as may be necesary to carry out the provisions of this Act."

The import of the Federal Communications Act is that the licensee of a radio station shall be fully amenable to public regulation of his station for the purpose of assuring operation of

the station in the public interest. The Commission may therefore adopt regulations against grant or renewal of a broadcasting license if the licensee has assumed an obligation to a third person encroaching upon his ability best to serve those whom his broadcasts reach.

The regulations involved here are of the same general kind and purpose as those upheld in *National Broadcasting Company* v. *United States, supra.* In both cases the regulations set forth in general terms the policy of the Commission in considering applications for licenses, and they proscribe contractual arrangements imposing an unreasonable limitation upon the freedom of the licensee to utilize broadcast time, and to be responsible for such utilization, in the public interest. The regulations "represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934." 319 U. S. 190, at p. 218.

Section 3.109 (b) represents the Commission's considered determination of how best to accommodate the "public interest" standard which it is under mandate to enforce, with conflicting outstanding private contractual interests. The regulation states minimum requirements to be required of all licensees. The reasons and bases for the three subsections which appellant questions may be summarized as follows:

Subsection (3) of Section 3.109 (b) prohibits the resale or reassignment to third parties of time reserved for his own use by the transferor or assignor of a station license. This prohibition insures that a licensee will continue to perform the elementary function of making the initial determination as to who shall broadcast over his station. The provisions of the Communications Act concerning determination by the Commission of the qualifications of licensees would be largely nullified if a licensee can, by contract, delegate to others the basic function of deciding to whom broadcast time is to be made available and for what purposes. Such a transfer of a licensee's prerogative is inconsistent with Section 310 (b) of the Act, which prohibits not only the transfer of a license without the prior consent of the Commission but the transfer of the "rights therein granted" unless the Commission first finds that such a transfer or disposal of rights is in the public interest.

Subsection (5) limits reservations of broadcast time to a maximum of fifteen years after the effective date of the rule. It thereby prevents licensees from disregarding their obligation periodically to review and reevaluate their program structure and to make such changes as will serve the public interest. If a station has by contract committed itself to broadcast the programs of any particular person or organization during cer-

tain hours of the day and week and over a large number of years, or indefinitely as in the instant case, it will have given up a large measure of its control over its facilities. It will be unable adequately to exercise its responsibility to watch over the station's program structure and to revise it from time to time. Since subsection (5) permits existing contracts to remain in effect for fifteen years subsequent to the adoption of the Rule, it cannot be said that the period of grace is unreasonably short or that there is an interference with existing equities.

Subsection (6) provides that the contract give the licensee a right of termination, for "substantial cause," upon the payment of a fair sum to be decided upon by the contracting parties. This requirement protects existing equities, but at the same time provides that the licensee shall have a power of contract termination requisite to performance of his duties as licensee. Consistent disagreement over programs, acquisition of a network affiliation by the licensee, assignment of a license, and transfer of control of a corporate licensee are given as illustrations of substantial cause for termination. Thus, a new transferee or assignee would be able to schedule the programs he believes desirable without being bound by the action of the former licensee. Similarly, acquisition of a network affiliation may open the door to programs of nationwide interest, which a right to reserved time might block. The rule

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leaves it to the parties to agree upon the sum to be paid by reason of termination for substantial cause, provided that the sum be not so large as effectively to prevent any termination.

Subsection (6) is thus a corollary to the provision in subsection (5) allowing properly modified contracts to continue in effect for fifteen years. It assures to licensees a necessary degree of flexibility during the contract period, in the event of a substantial change in circumstances. But the contract termination which is provided for may not be at the whim of the licensee, and the other contracting party is guaranteed reasonable compensation for the loss of its contract rights.

Section 3.109 is in full accord with the decision rendered in *Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (C. A. D. C.). In that case, which was decided prior to issuance of Section 3.109, the Commission denied an application for renewal of a station license unless the station would give no further effect to a contract which reserved to the transferor an exclusive use of broadcast time of 17½ hours per week for a period of nearly 100 years, and provided for a reversion of the license to the transferor if the contract provisions were not carried out. The court of appeals held that the Commission was authorized to find, as it did, that the contract provisions were contrary to the public interest. The court, however, pointed out

that the contract had been made in good faith, and held that the Commission had erred in requiring complete abrogation of the contract without considering the possibility of some other modification which would preserve so far as possible the equities of the transferor and yet be consistent with the public interest. The court remanded the case to the Commission to determine whether a modified contract, allowing a reservation of broadcast time for a period of reasonable duration, would be contrary to the public interest. The present regulations were promulgated in strict accordance with these principles.

Regents of the University System of Georgia v. *Carroll,* 338 U. S. 586, is not pertinent here. That case did not involve the power of the Commission to refuse to renew a license unless provisions of a contract made by the licensee, found to be inconsistent with proper performance of the licensee's duty to operate its station in the public interest, were abrogated or modified. The Court, in fact, assumed that the Commission was vested with such power (see pp. 595–596, 601). The case concerned solely the question, not presented here, of the effect of the Commission's rulings with respect to such a contract on the private rights of the parties in a proceeding thereunder in a state court following unilateral repudiation of the contract by the licensee.

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CONCLUSION

The appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

BENEDICT P. COTTONE,
General Counsel,
Federal Communications Commission.

APRIL 28, 1950.

APPENDIX

(14 F. R. 179)

§ 3.109 *Special rules relating to contracts providing for reservation of time upon sale of a station.* (a) No license, renewal of license, assignment of license, or transfer of control of a corporate licensee shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license of the transferor of stock, where transfer of a corporate licensee is involved, or the nominee of such assignor or transferor retains any right of reversion of the license or any right to the reassignment of the license in the future, or reserves the right to use the facilities of the station for any period whatsoever.

(b) In the case of assignment of license or transfer of control of a corporate licensee approved by the Commission before the effective date of this section, February 15, 1949, involving a contract, arrangement or understanding of the type covered by paragraph (a) of this section and the existence and terms of which were fully disclosed to the Commission at the time of execution, the Commission will give consideration to the issuance of a license despite the existence of such contract, arrangement or understanding, if the parties thereto modify such contract within

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6 months from the effective date of this section. Such modifications will be considered on the facts of each case but no such modification will be approved unless the modified contract contains at least the following provisions:

(1) A maximum limitation of the time subject to reservation so that no more than 12 hours per week shall be subject to reservation, of which no more than 4 hours shall be on any given day.

(2) A clause providing that the licensee reserves the right to reject or refuse programs which he reasonably believes to be unsatisfactory or unsuitable or for which, in his opinion, a program of outstanding local or national importance should be substituted, but provision may be made for the substitution of other radio time for programs so rejected or for the payment at the station card rate for the time made unavailable.

(3) A prohibition against the resale or reassignment of any of the broadcast time reserved by such modified contract.

(4) An express negation of any right with respect to reversion or reassignment of license.

(5) An express provision setting forth a definite expiration date of the contract, arrangement or understanding. Such expiration date shall not extend beyond February 15, 1964, and shall in no event extend beyond the expiration date originally provided for in any such contract, agreement or understanding, in the event that such expiration date is a date prior to February 15, 1964.

(6) An express provision giving to the licensee the right to terminate the contract arrangement or understanding for substantial cause, including,

but not limited to, the assignment of license or the transfer of control of a corporate licensee, consistent disagreement over programs between the parties, or the acquisition of a network affiliation by the licensee, upon the payment of a lump sum or periodic payments, and providing that the amount initially fixed shall thereafter decrease as the amount of time reserved is decreased by performance of the contract. Any such payment should not be so unduly large as to constitute in practice an effective deterrent to the licensee exercising the right of termination. In determining whether the amount is unduly large, the Commission will consider the amount by which consideration in return for the transfer of the station was decreased by reason of the reservation of time or the present value of the radio time still reserved and unused as of the date of the exercise of the right of termination.

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